DC 37, L. 375, 5 OCB2d 25 (BCB 2012)

(Arb.) (Docket No. BCB-3005-12) (A-14109-12)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DEP wrongfully disciplined the Grievant by transferring him to a new work location. The City argued that the Grievant was not a member of the Union at the time of his reassignment and, thus, had no rights under the Agreement. The City additionally argued that no contractual provision limits management's right to transfer employees, and insufficient facts supported the argument that the transfer was disciplinary. The Union argued that the Grievant became a member of the bargaining unit two days prior to his transfer and, therefore, he is entitled to utilize the grievance procedure. The Union also argued that the transfer was punitive and that DEP's stated rationale was pretextual. The Board found that the threshold question of whether the Grievant was a member of the bargaining unit at the time of his transfer was one of fact for an arbitrator to determine. It also found that the Union established the requisite nexus because it raised a substantial question as to whether the transfer was disciplinary. Accordingly, the City's petition challenging arbitrability was denied, and the Union's request for arbitration was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 375, AFSCME, AFL-CIO
on behalf of STEVE AWAD,

Respondent.

DECISION AND ORDER

On January 24, 2012, District Council 37, Local 375, AFSCME, AFL-CIO ("Union") filed a request for arbitration on behalf of Steve Awad ("Grievant"), alleging that the City of New

York ("City") violated Article VI, § 1(e), of the 2005-2008 Engineering & Scientific Agreement ("Agreement") when it wrongfully disciplined the Grievant by reassigning him to a new work location. On March 2, 2012, the City and its Department of Environmental Protection ("DEP") filed a petition challenging the arbitrability of the grievance. The City asserts that, because the Grievant was not a member of the Union at the time of his reassignment, he had no rights under the Agreement. The City further argues that no contractual provision limits management's right to transfer employees, and insufficient factual allegations support the Union's claim that the transfer was disciplinary. The Union argues that the Grievant became a member of the bargaining unit two days prior to the transfer and, therefore, he is entitled to utilize the grievance procedure. The Union also argues that it has alleged sufficient facts to support its contention that the transfer was punitive and that DEP's stated rationale was pretextual. This Board finds that the threshold question of whether the Grievant was a member of the bargaining unit at the time of his transfer is one of fact for an arbitrator to determine. This Board also finds that the Union has established the requisite nexus because it raises a substantial question as to whether the transfer was disciplinary. Accordingly, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

The Grievant is a licensed Professional Engineer and has been employed with DEP since November 1988. The Union is the duly certified collective bargaining representative for the Grievant's civil service title, Mechanical Engineer ("ME"). The Union and DEP are parties to the Agreement, which expired on March 2, 2008, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

The Grievant obtained a permanent civil service appointment as an ME Level 1 in September 1996. He was promoted to an ME Level 2 position in September 2002 and became an ME Level 3 in July 2007. In November 2009 the Grievant was provisionally promoted from his ME Level 3 position to the management title of Administrative Engineer, Grade M2. In this position the Grievant served as a Deputy Director in the Division of Emergency Response and Technical Assessment ("DERTA") in Lefrak City, New York ("Lefrak").

While working as an Administrative Engineer, the Grievant supervised one employee directly and thirteen others indirectly. He was also responsible for ensuring that facilities reported their chemical inventories to DEP and for overseeing inspections of facilities. The Grievant's immediate supervisor was Greg Hoag, a Police Captain who served as Executive Director of DERTA. The Union asserts, and the City denies, that from the beginning of the Grievant's promotion to Administrative Engineer, he and Hoag experienced work-related friction, continually disagreeing over a variety of management issues related to personnel matters. It is undisputed that at some point prior to the Grievant's transfer, he engaged in a verbal argument with Hoag. However, the Union and the City disagree over the timing of this argument as well as the circumstances which led to it.

According to the Union, sometime in September 2011 the Grievant's security clearance was removed and this led to the argument. The Union asserts that the Grievant informed DEP's Deputy Commissioner of the argument shortly thereafter and stated that, if DEP believed he had done anything wrong, it should begin disciplinary proceedings. The Union asserts that the Deputy Commissioner's response was that he did not need to do that. The City denies that the security clearance was removed, but states that sometime in August 2011 the Grievant's access to certain areas of DEP's office was "inadvertently cut off." (Ans. ¶ 10) The City asserts that on or about August 12, 2011, the Grievant shouted at Hoag regarding this oversight. The City

denies that the Grievant and the Deputy Commissioner had the above-referenced conversation shortly after the argument. However, the City states that on or about September 26, 2011, the Deputy Commissioner spoke with the Grievant about his behavior towards Hoag.

It is undisputed that on September 26, 2011, the Grievant was issued a memorandum informing him that effective the following day, September 27, he would be transferred to BPS's Security Systems Engineering facility in Valhalla, New York. Furthermore, although not stated in the memorandum, the Grievant's provisional promotion was rescinded, and his position reverted to his underlying civil service title of Mechanical Engineer. The City and the Union dispute the actual date that the change in title was implemented.

The City asserts that the change in title occurred concurrently with the transfer on September 27. The Union argues that the Grievant's title reverted on September 25 and, thus, he became a member of the bargaining unit on that date. In support of this argument, the Union refers to the Grievant's paystub for the period of September 25 through October 10, which reflects the fact that Union dues were deducted for this entire period. (*See* Ans., Ex. 1) The City, however, points to the Grievant's Job and Salary History, as reflected on a printout from the City's Payroll Management System, which lists September 27 as the date on which the Grievant's pay as a Mechanical Engineer became effective. (*See* Pet., Ex. 4) The City also argues that the Grievant's gross payment was prorated for the period of September 25 through October 10 to reflect the fact that he was paid a higher wage as an Administrative Engineer for September 25 and 26. The City additionally contends that DEP's Payroll Unit does not prorate Union dues. However, the City states that the Grievant's recurring service increment payment was prorated for the twelve days that he was included in the bargaining unit.

The Union asserts that, prior to the transfer, the Grievant had worked throughout his entire career with DEP at locations within the five boroughs of New York City. Specifically, he

had worked for twenty years prior to the transfer at Lefrak, and the Union states that he chose the location of his personal residence based on this work assignment. The Union points to a number of factors which, it argues, demonstrate that the Grievant's transfer to a facility upstate was disciplinary in nature.

First, the Union contends that although the Grievant was working as an ME Level 3 prior to his promotion, after the transfer he was incorrectly placed in a Level 2 position. He remained in this position for about a month before the error was corrected and he was placed back at Level 3. The City denies these allegations. The Union also asserts that the Grievant was improperly assigned to be supervised by an employee who was a fellow ME Level 3. The City admits that this employee supervised the Grievant, but asserts that the employee was promoted to an Administrative Engineer position in or around January 2012.

The Union contends that once transferred, the Grievant's pay was reduced by more than 20 percent, to a salary that is less than what he would have been earning had he not been provisionally promoted. The Union also argues that this salary violates the City's Personnel Services Bulletin ("PSB"), 32-2R, § C. 1.[1] According to the Union, the Grievant should currently be paid an annual salary of $103,007, but is only being paid $88,000. The City denies these allegations and states that the salary dispute is irrelevant to the issue at hand since it is the subject of a separate grievance, filed at Step I on or about October 27, 2011.

[1] PSB, 32-2R, § C. 1. states:

> A manager who is reassigned to a lower assignment level within the Pay Plan for Management Employees (PPME) due to reasons other than incompetence or misconduct will receive the Minimum Entitlement. Such manager's salary may exceed the maximum of the pay level to which he/she has been assigned. The total salary reduction for such a manager during any twelve month period must not exceed 20%. Also, his/her salary may not be further reduced at any future time for the same instance or reassignment.

The Union also contends that, not only did DEP transfer the Grievant to a distant and inconvenient location, but it also revoked his use of a City vehicle, increased the cost of his commute, and added three additional hours to his daily commute. The City admits that the Grievant is no longer given a City vehicle, but states that this is because his new position does not require the use of a vehicle overnight.

The Union additionally asserts that the transfer resulted in the Grievant being assigned only minor responsibilities which are inconsistent with his skill, experience and expertise. The City denies these allegations and also argues that they are irrelevant. The Union further argues that the Grievant's actual work assignments have not been made clear, as he has not been issued new tasks and standards. The City states that the Grievant's tasks and standards are currently being developed.

In addition, the Union argues that the Grievant has been given limited or no Internet access, even though he needs this to perform research for his job, and he also has not been issued a long distance phone access code. Furthermore, although his expertise is security, the Grievant has not been given access to all police precincts. The City denies these allegations.

Finally, the Union contends that although the Grievant does not earn any cash overtime, DEP still requires him to use a hand scanner to check in and out of work, in violation of the City's Interpretive Memorandum #100, § 1(c), dated January 16, 2009.[2] It also argues that he is

[2] Section 1(c) of this Memorandum states:

> Employees who are not covered by FLSA or subject to an overtime cap waiver and whose annual gross salary rate plus all overtime, differentials and premium paid year to date is in excess of the cap set forth above shall not be required to follow daily time clock or sign-in procedures, but shall be required to submit periodic time reports at intervals of not less than one week. The periodic time report shall be in such form as is required by the Agency.

the only member of the engineering unit who is not permitted to work overtime. The City denies these allegations and argues that the overtime dispute is irrelevant to the Grievant's transfer because it is the subject of a separate grievance, filed at Step I on or about April 9, 2012.

On November 1, 2011, the Union filed both Step I and Step II grievance forms, alleging that DEP violated Article VI, § [1](e)and (f) of the Agreement when it wrongfully disciplined and transferred the Grievant.[3] The Union requested, as a remedy, that DEP return the Grievant to Lefrak, reimburse him for the commute, and otherwise make him whole in every way. On November 10, 2011, DEP's Assistant Counsel issued a letter denying the grievance, stating that "[a]s Grievant was an Administrative Engineer when he transferred on September 26 he is precluded from grieving the transfer under the [Agreement]." (Pet., Ex. 8)

On November 17, 2011, the Union requested a Step III review of the grievance. On December 5, 2011, a review officer with the Office of Labor Relations ("OLR") denied the grievance, concluding that "since Grievant was not represented by the Union at the time of his transfer, Grievant is precluded from grieving the transfer under the [Agreement]." (Pet., Ex. 10)

On January 24, 2012, the Union filed a request for arbitration, which stated the issue to

---

[3] Section 1 of Article VI defines the term "grievance," in pertinent part, as:

> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by [§] 75 (1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.
>
> f. Failure to serve written charges as required by [§] 75 of the Civil Service Law . . . upon a permanent Employee covered by [§] 75 (1) of the Civil Service Law . . . where any of the penalties (including a fine) set forth in [§] 75 (3) of the Civil Service Law have been imposed.

(Pet., Ex. 1)

be arbitrated as:

> Whether the employer, the [DEP], violated the [Agreement] by wrongfully disciplining the grievant by reassigning the grievant upstate, and if so, what shall be the remedy?

(Pet., Ex. 2) As a remedy, the Union seeks "[e]xpungement of all disciplinary records, reassign[ment of] the grievant to Lefrak and any other remedy necessary to make the grievant whole." (Pet., Ex. 2)

POSITIONS OF THE PARTIES

City's Position

The City argues that no nexus exists between the Grievant's transfer and Article VI, § 1(e), of the Agreement. It contends that the Grievant's transfer and the demotion to his underlying civil service title occurred concurrently on September 27, 2011. Therefore, he was a member of management at the time of his reassignment and, thus, he had no rights under the Agreement. As such, the City asserts that there is no duty to arbitrate the Grievant's transfer.

The City further contends that even if the Grievant were subject to the Agreement, his transfer cannot be challenged, as no provision of the Agreement limits the City's right to transfer employees. Furthermore, it maintains that NYCCBL § 12-307(b) unequivocally guarantees the right of the City to reassign employees.[4]

Finally, the City argues that when its management right to transfer employees is challenged as being of a disciplinary nature, the Union has the burden to establish that a

[4] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city . . . to direct its employees; [and] determine the methods, means and personnel by which government operations are to be conducted.

substantial issue exists in this regard. In this instance, the Union has presented only conclusory allegations of discipline, and no facts to support these allegations. As such, the Union cannot establish a nexus between the transfer and Article VI, § 1(e), of the Agreement. Thus, the City's petition challenging arbitrability should be granted.

Union's Position

The Union argues that the City's claim that the Grievant was not a member of the bargaining unit at the time of his transfer is factually incorrect. The Grivant's pay stub for the period of September 25 through October 8, 2011 demonstrates that the Grievant was a member of the bargaining unit on the date of his transfer, September 27.

The Union also argues that it has alleged sufficient facts to raise a substantial question as to whether the transfer was disciplinary. The Union cites *Doctors Council*, 53 OCB 18 (1994), for the proposition that a failure to serve formal disciplinary charges does not bar the arbitration of a claim of wrongful discipline when such facts are raised. The Union contends that the circumstances surrounding the transfer demonstrate that it was a punitive action, driven by DEP's animus.

As evidence of the punitive nature of the transfer, the Union argues that DEP demonstrated its animus towards the Grievant by:

> 1) reducing the Grievant's salary by more than the 20% Cap; 2) reducing and then correcting the Grievant's level from M.E. 2 to M.E. 3; 3) taking away his City car; 4) failing to assign the Grievant new work at the new location commensurate with his skill and experience; 5) failing to provide new tasks and standards; 6) failing to provide access to tools required for the job from a phone code to appropriate internet access; 7) directing the Grievant to report to another Level 3 employee; 8) not permitting the Grievant to sign in and out; 9) and requiring him to use the hand scan notwithstanding that his salary was sufficient to not have that responsibility; 10) not allowing the Grievant any overtime opportunities, and 11) banishing the Grievant to a work location that represents a hardship in car costs and commuting time.

(Union Memorandum of Law, p. 11)

In sum, the Union argues that it has alleged sufficient facts to demonstrate that the Grievant's transfer was disciplinary in nature and, therefore, it has established the requisite nexus between the transfer and the Agreement. Consequently, the petition challenging arbitrability should be denied.

DISCUSSION

"The policy of [this Board], 'as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances.'" *OSA*, 1 OCB2d 42, at 15 (BCB 2008) (quoting *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006)).[5] In recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a

[5] Section 12-302 of the NYCCBL provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

> reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 420, 5 OCB2d 4, at 12 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). As the Board lacks jurisdiction to enforce contractual rights, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citing *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002); *DC 37*, 27 OCB 9, at 5 (BCB 1981)); *see also* N.Y. Civ. Serv. Law ("CSL") § 205(5)(d).

This Board has long held that "[w]hen a case involves a factual dispute or a question of contract interpretation, [we] will submit the case for resolution by an arbitrator." *Local 371, SSEU*, 69 OCB 33, at 5 (BCB 2002) (citing *SSEU*, 61 OCB 3 (BCB 1998); *DC 37*, 47 OCB 1 (BCB 1991)). In the instant matter it is undisputed that the parties have agreed to submit certain disputes to arbitration. At issue, however, is whether the Grievant is entitled to utilize the grievance procedure, as well as whether the parties' obligation to arbitrate is broad enough to encompass the present controversy. For the reasons discussed below, we find that the Union has presented both questions of fact and issues of contract interpretation. Consequently, we find that the dispute is arbitrable and we dismiss the City's petition challenging arbitrability.

The threshold question at issue is whether or not the Grievant was a member of the bargaining unit at the time of his transfer and, thus, entitled to grievance rights under the parties' Agreement. The Union argues that the Grievant began paying union dues for the entire pay period which began on September 25, 2011. Therefore, it asserts that the Grievant was a member of the bargaining unit prior to his transfer on September 27. The City argues that the Grievant was demoted to the title of ME at the same time that he was transferred. To support this argument the City contends that the Grievant's paystub, as well as his Job and Salary History, demonstrate that he began being paid as an ME on September 27. The City also argues

that the Grievant's recurring service increment payment during that pay period was prorated to include only the twelve days that he was included in the bargaining unit, beginning on September 27. These allegations and supporting evidence pose a factual dispute sufficient to warrant determination by an arbitrator. *See Local 371, SSEU*, 69 OCB 33, at 5-6.

In *Local 371, SSEU*, as here, the parties' dispute regarding an employee's right to arbitrate her termination turned on the date of a personnel action as to which the documentary evidence disagreed. The Board found that the factual dispute was properly one for an arbitrator to decide. *Local 371, SSEU*, 69 OCB 33, at 5-6. Similarly, the issue of the date on which the Grievant became a member of the bargaining unit presents both a factual dispute as well as a question of contract interpretation. Thus, it is a proper subject for arbitration. *See also OSA*, 53 OCB 28, at 8 (BCB 1994) ("The conflict between the parties' interpretations of when the grievant had completed two years of service, and when she was terminated, presents a question of contract interpretation as well as a question of fact, which are for an arbitrator to decide.").

We also find that the Union has established a nexus between the Grievant's transfer and Article VI, § 1(e) of the Agreement. The City argues that under NYCCBL § 12-307(b), it has the unequivocal management right to reassign employees. Where this management right is challenged, a union's bare allegation that a transfer was for a disciplinary purpose will not suffice. *Doctors Council*, 53 OCB 18, at 13 (BCB 1994). Rather, "'the burden is on the Union to present a substantial issue' by alleging facts, which, if proven, would establish that the act complained of was disciplinary in nature." *DC 37, L. 768*, 4 OCB2d 45, at 12-13 (BCB 2011) (quoting *Local 141, IUOE*, 49 OCB 30, at 9 (BCB 1992)). The absence of formal written charges will not bar the arbitration of a claim of wrongful discipline, even if the contractual provision upon which the grievance is based requires such written charges. *DC 37, L. 768*, 4 OCB2d 45, at 13 (citing *Local 375, DC 37*, 51 OCB 12, at 13 (BCB 1993), *affd., Matter of*

N.Y.C. Dept. of Sanitation v. MacDonald, Index No. 402944/93 (Sup. Ct. N.Y. Co. Dec. 20, 1993) (Ciparik, J.), *affd.*, 215 A.D.2d 324 (1 Dept. 1995), *affd.*, 87 N.Y.2d 650 (1996)). "'Whether an act constitutes discipline depends on the circumstances surrounding the act' and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive." *DC 37, L. 768*, 4 OCB2d 45, at 13 (quoting *Local 375, DC 37*, 51 OCB 12, at 13).

In support of its argument that the transfer was of a disciplinary nature, the Union alleges that it followed a verbal argument between the Grievant and his supervisor, which was the culmination of months of work-related conflicts between the two. Although the City disputes the timing between the argument and the transfer, it maintains that the Grievant was notified of the transfer on the same day that the Deputy Commissioner spoke to him regarding his behavior towards his supervisor. The Union also alleges that the Grievant was transferred to a distant location that poses a hardship in vehicle costs and commuting time. Additionally, it contends that the Grievant was assigned to a lower level position than he should have been for over a month; that he continues to be assigned only minor responsibilities which are inconsistent with his skill, experience and expertise; and that he is being deprived of sufficient Internet and phone access that is necessary to complete his job. Furthermore, the Union argues that the Grievant is currently being paid a salary that is less than he would have earned had he never been promoted, and that this salary is lower than the 20 percent cap provided for in the City's own policies, as detailed in PSB, 32-2R, § C. 1.

We find that these factual allegations, among others raised by the Union, demonstrate that a substantial question has been raised as to whether the Grievant's transfer was disciplinary in nature. *See Local 375, DC 37*, 51 OCB 12, at 14 (listing grievant's transfer to a distant and inconvenient location as factor to support union's allegations of the punitive nature of transfer);

DC 37, L. 768, 4 OCB2d 45 (finding substantial question regarding disciplinary nature of grievant's reassignment when it followed a series of work-related conflicts with supervisor). *Cf. Local 1549, DC37*, 37 OCB 40 (BCB 1986) (finding grievant's reassignment was not of a disciplinary nature, but listing salary decrease, change in job title and level, and transfer to distant or inconvenient location as factors which may support such a finding).

As the Union has established the requisite nexus between the transfer and Article VI, § 1(e), of the Agreement, it is entitled to proceed to arbitration. We therefore submit to an arbitrator the threshold question of whether the Grievant was a member of the bargaining unit at the time of his transfer. If it is determined that he was not, then he is not entitled to grievance rights under the Agreement and the inquiry will end there. However, if the arbitrator determines that the Grievant became a member of the bargaining unit on September 25, 2011, then the Grievant is entitled to utilize the grievance procedure. Alternatively, if the arbitrator finds that the Grievant was transferred and demoted concurrently, the arbitrator must then interpret whether this means that the Grievant was a member of the bargaining unit, and thus was entitled to utilize the grievance procedure, on September 27, 2011. If the threshold question of whether the Grievant was a member of the bargaining unit at the time of his transfer is resolved in his favor, it will remain for the arbitrator to decide whether the Grievant's transfer constituted a wrongful disciplinary action.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Department of Environmental Protection, docketed as BCB-3005-12, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 375, AFSCME, AFL-CIO, docketed as A-14109-12, hereby is granted in order for the arbitrator to determine whether the Grievant was a member of the bargaining unit at the time of his transfer and, if so, to determine the merits of the grievance as explained in the decision herein.

Dated: July 10, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER